

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
ENTERED

SEP 27 2004

CLARICE S. POPE,

Plaintiff,

vs.

JO ANNE B. BARNHART,
Commissioner, Social
Security Administration

Defendant.

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CIVIL ACTION NO. H-03-3968

Michael N. Milby, Clerk of Court

OPINION ON SUMMARY JUDGMENT

Plaintiff Clarice Pope filed this action pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3) for judicial review of an unfavorable decision by the Commissioner of the Social Security Administration of Pope's claim for supplemental security income payments under Title XVI of the Social Security Act.

Before the court is Pope's Motion for Summary Judgment, and the Commissioner's Motion for Remand.¹ Having reviewed the motions, the submissions of the parties, the pleadings, the administrative record, and the applicable law, the court is of the opinion that Pope's Motion for Summary Judgment (Dkt. No. 14) should be GRANTED, the Commissioner's Motion for Remand (Dkt. No. 20) should be GRANTED, and the ALJ's decision denying benefits should be REVERSED, and the case should be REMANDED to the Commissioner for further administrative proceedings consistent with this opinion.

¹The Commissioner originally filed a Motion for Summary Judgment (Dkt. No. 9), but the court will treat that motion as withdrawn in light of the Commissioner's Motion for Remand.

I. BACKGROUND

A. Procedural History

Pope filed an application for Supplemental Security Income (“SSI”) benefits with the Social Security Administration on November 30, 1999. (Tr. 143-46, 166).² Pope alleges she is disabled and has been unable to work since September 19, 1999, due to an injury to her right foot and leg sustained while working as a crossing guard. (Tr. 144, 166). After Pope’s application was denied at the initial and reconsideration levels (Tr. 70-84), Pope requested a hearing before an administrative law judge, which was held on October 18, 2002. (Tr. 13, 21-69, 85).

In a decision dated January 17, 2003, the ALJ denied Pope’s application for SSI benefits, finding that Pope was not disabled as defined by the Act. (Tr. 13-19). The Appeals Council approved the ALJ’s decision, thereby transforming it into the final decision of the Commissioner. (Tr. 5-9, 350-55). *See Sims v. Apfel*, 530 U.S. 103, 107 (2000).

On September 29, 2003, Pope filed a complaint pursuant to 42 U.S.C. §§ 405(g) and 1383(C)(3), seeking judicial review of the ALJ’s decision. (Dkt. No. 1). After initially moving for summary judgment (Dkt. No. 9), the Commissioner now moves to remand the matter (Dkt. No. 20) under sentence four of 42 U.S.C. § 405(g),³ for further administrative proceedings to evaluate Pope’s past relevant work at step four of the sequential evaluation process, and to proceed to step five, if necessary.

²The transcript of the administrative record will be cited as “Tr. __”.

³Sentence four of 42 U.S.C. § 405(g) provides that “The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.”

B. Factual History

Pope alleges that while working as a crossing guard in September 1995, she injured her right ankle stepping on an uneven wheelchair ramp. (Tr. 36). This incident apparently aggravated life-long problems Pope had with her feet and ankles. (Tr. 200-349). In the months following the accident, Pope sought treatment from Drs. Gaspar Argilagos and James Ghadially. (Tr. 276, 310). Various x-rays, computer tomographic ("CT") scans, and MRI's were taken, revealing an unhealed metatarsal head on Pope's right foot, osteoarthritic change of the entire joints of the foot and ankle, sinus tarsi, and tarsocanal syndrome. (Tr. 300, 302, 306, 311-12).

Dr. Ghadially performed surgery on Pope on November 5, 1996. (Tr. 200, 203-05, 297-98). She underwent ankle arthroscopy, tarsal tunnel release, and excision of a hypertrophied bone on the fifth metatarsal of her right foot. (Tr. 200, 290, 297-98). In 1997, Dr. Ghadially determined that Pope needed further surgery to remove her fifth metatarsal, as well as neurolysis of the deep peroneal nerve. (Tr. 279, 284). Around April 16, 1997, Dr. Ghadially applied for further surgery, but related that such surgery was not approved by her worker's compensation carrier. (Tr. 283, 286). Dr. Joseph Mechanik evaluated Pope on September 10, 1997. (Tr. 276). He also determined that she still suffered from chronic tarsal tunnel syndrome, and agreed with Dr. Ghadially that further surgery was needed to remove her fifth metatarsal head, as well as to release the deep peroneal nerve and posterior tibial nerve on her right foot. (Tr. 276-78). Accordingly, he submitted Pope as a candidate for surgery on September 10, 1997. (Tr. 278). Dr. Argilagos also indicated Pope would probably require more surgery in the future if her condition did not improve. (Tr. 209-10).

From March 1998 to February 1999, Drs. Ghadially and Mechanik continued to diagnose Pope as suffering from these conditions and repeatedly submitted Pope for surgical intervention, but the surgery was not authorized. (Tr. 254, 257-61, 266-67, 272).

A disability determination performed by Dr. Jimmy L. Breazeale on February 2, 2000 confirmed that Pope suffered from a fracture of the right fifth metatarsal and tarsal tunnel syndrome. (Tr. 70-71). On June 6, 2002, Dr. Frank L. Barnes, an orthopedic surgeon, examined Pope on behalf of the SSA. (Tr. 321, 353). Dr. Barnes found that Pope's right fifth toe was somewhat floppy, dorsally displaced, and compatible with x-ray findings of dislocation of the PIP joint of the fifth toe. (Tr. 322). It was also Dr. Barnes's impression that Pope was suffering from cervical and lumbar strain syndrome and residual loss of motion of feet due to prior club foot deformity. (Tr. 323).

At the administrative hearing, Pope contended that she is disabled due to a lifetime of problems related to club foot; degenerative disk disease in her neck; pain in her cervical and lumbar spine; and pain in her right arm, hand, and shoulder. (Tr. 25, 28-29, 50-51). Pope also described the injury to her right foot while working as a crossing guard. (Tr. 34, 36). Pope testified that due to the pain she could only walk about a block, and that she has difficulty sitting more than ten to fifteen minutes at a time. (Tr. 35, 49, 51).

The ALJ also heard testimony from Susan Rapant, the vocational expert. (Tr. 54). Rapant first classified Pope's past experience as a crossing guard as light, unskilled work. (Tr. 55). She also classified Pope's previous case aide position (alternatively referred to as "community worker" or "community worker with AmeriCorps VISTA" in the record) as light, semiskilled work. (Tr. 55). Rapant opined that Pope could not return to any of her past relevant work, even assuming that she could stand or walk up to three hours a day. (Tr. 58). However, Rapant concluded that Pope could

perform other sedentary jobs, such as a surveillance monitor, an order clerk, and an assembler. (Tr. 58-59).

After reviewing the evidence, the ALJ determined that Pope was not disabled, using the five-step analysis specified in 20 C.F.R. § 416.920(a). (Tr. 13, 19). At step one, the ALJ found that Pope has not engaged in substantial gainful activity since the alleged onset of disability. (Tr. 18). At step two, the ALJ concluded that Pope has a combination of impairments that are “severe” for purposes of 20 C.F.R. § 416.920(b); in particular, residuals from foot surgery, club feet, lumbar strain, and cervical strain, but held that these impairments did not meet or equal one of the listed impairments in Appendix 1, Subpart P, Regulation No. 4. (Tr. 16, 19).

Most important to the present dispute are the ALJ’s findings at step four. The ALJ determined that Pope had the residual functional capacity to perform work at the light exertional level and the ability to stand or walk for a total of three hours in an eight hour work day. (Tr. 17, 19). Additionally, the ALJ concluded that Pope’s past relevant work as a case aide did not involve the performance of any activities precluded by her residual functional capacity. (Tr. 19).

II. APPLICABLE LAW

A. Standard of Review

In Social Security disability cases, 42 U.S.C. § 405(g) governs the standard of review. *Waters v. Barnhart*, 276 F.3d 716, 718 (5th Cir. 2002). The federal courts review the Commissioner’s denial of benefits to ascertain whether (1) the final decision is supported by substantial evidence, and (2) whether the Commissioner used the proper legal standards to evaluate the evidence. *Masterson v. Barnhart*, 309 F.3d 267, 272 (5th Cir. 2002). “Substantial evidence” means that the evidence must

be enough to allow a reasonable mind to support the Commissioner's decision. *See Brown v. Apfel*, 192 F.3d 492, 496 (5th Cir. 1999) (citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In applying this standard on review, the court "scrutinize[s] the record to determine whether such evidence is present." *Myers v. Apfel*, 238 F.3d 617, 619 (5th Cir. 2001). If the Commissioner's findings are supported by substantial evidence, they must be affirmed. *Newton v. Apfel*, 209 F.3d 448, 452 (5th Cir. 2000). The court does not reweigh the evidence, try the issues *de novo*, or substitute its judgment for that of the Commissioner. *Myers*, 238 F.3d at 619. "Conflicts in the evidence are for the Commissioner and not the courts to resolve." *Masterson*, 309 F.3d at 272. The courts strive for judicial review that is deferential but not so obsequious as to be meaningless. *Brown*, 192 F.3d at 496.

B. Standard for Determining Disability under the Act

The Act authorizes payment of disability insurance benefits and supplemental security income to individuals with disabilities. *Barnhart v. Walton*, 535 U.S. 212, 214 (2002). "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."⁴ 42 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A).

A physical or mental impairment is defined as "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The mere presence of an impairment,

⁴The duration provision requires only that the impairment last twelve continuous months; there is no requirement that a claimant be unable to engage in work for the entire twelve month period. *See Singletary v. Bowen*, 798 F.2d 818, 821 (5th Cir. 1986).

however, does not necessarily establish a disability. *Anthony v. Sullivan*, 954 F.2d 289, 293 (5th Cir. 1992). A claimant is disabled only if she is incapable of engaging in any “substantial gainful activity,” which is defined as “work activity involving significant physical or mental abilities for pay or profit.” *Newton*, 209 F.3d at 452-53.

Pain can constitute a disabling impairment. *See Cook v. Heckler*, 750 F.2d 391, 395 (5th Cir. 1985). Pain is disabling if it is “constant, unremitting, and wholly unresponsive to therapeutic treatment.” *Selders v. Sullivan*, 914 F.2d 614, 618-19 (5th Cir. 1990). The determination whether a claimant is able to work despite some pain is within the discretion of the ALJ and should be upheld if supported by substantial evidence. *See Chambliss v. Massanari*, 269 F.3d 520, 522 (5th Cir. 2001). Subjective complaints of pain must also be corroborated by objective medical evidence. *Id.*

To determine whether the claimant is, in fact, disabled, the ALJ follows a five-step analysis outlined in 20 C.F.R. § 416.920(a). First, the claimant must not be presently engaged in substantial gainful activity. Second, a claimant must have an impairment or combination of impairments which significantly limits her physical or mental ability to do basic work activities. Third, to secure a finding of disability without consideration of age, education, and work experience, a claimant must establish that her impairment meets or equals an impairment in the appendix to the regulations. If so, she is presumed disabled and is entitled to benefits without further inquiry. Fourth, a claimant must establish that her impairment prevents her from doing past relevant work. Fifth, the impairment must prevent her from doing any other work. *Waters v. Barnhart*, 276 F.3d 716, 718 (5th Cir. 2002).

The claimant bears the burden of proof under the first four steps. If the claimant successfully carries that burden, the burden shifts to the Commissioner in step five to show that other substantial

gainful employment is available in the national economy, which the claimant is capable of performing. If the Commissioner successfully makes that showing, the burden shifts back to the claimant to prove that she cannot perform the alternative work suggested. A finding that a claimant is disabled or is not disabled at any point in the five-step review is conclusive and terminates the analysis. *Masterson*, 309 F.3d at 272.

III. ANALYSIS

Pope contends the ALJ erred at step four of the five-step evaluation process. Step four requires the ALJ to assess a claimant's residual functional capacity, to determine if the claimant can still perform her past relevant work. *See* 20 C.F.R. § 416.920(a)(4)(iv). Pope presents essentially two challenges to the ALJ's determination at step four: (a) that the ALJ erred by finding that Pope has the residual functional capacity to perform work at the light exertional level; and (b) that the ALJ incorrectly found that Pope's volunteer work as a case aide was "past relevant work" which she was still able to perform.

A. Light Exertional Level Finding

Pope contends the ALJ's finding that she has the residual functional capacity for work at the light exertional level is not supported by substantial evidence. The court agrees.

A claimant's residual functional capacity is the greatest capability of an individual to do work despite any limitations. *See* 20 C.F.R. § 416.945. The level of residual functional capacity is derived from an assessment of a claimant's limitations, based on medical evidence, personal testimony, and testimony from other individual(s) or opinions from physicians. *Id.*

The ALJ based his light exertional level conclusion in part on the fact that Pope was not taking pain medication; had not had a doctor's appointment since May 2000; did not seek emergency room care on a frequent basis; had not been hospitalized for any duration since the onset of the alleged disability; and did not require any assistive devices on a long-term basis. (Tr. 17).

Before an ALJ can dismiss allegations of pain based on the absence of pain medication or medical treatment, the ALJ must first consider alternative explanations found in the record. *See* Social Security Ruling ("SSR") 96-7p.⁵ SSR 96-7p states that in assessing the credibility of an individual's statements about symptoms:

[T]he adjudicator *must not draw any inferences* about an individual's symptoms and their functional effects from a failure to seek or pursue regular medical treatment *without first considering any explanations that the individual may provide*, or other information in the case record, that may explain infrequent or irregular medical visits or failure to seek medical treatment. The adjudicator may need to recontact the individual or question the individual at the administrative proceeding in order to determine whether there are good reasons the individual does not seek medical treatment or does not pursue treatment in a consistent manner. The explanations provided by the individual may provide insight into the individual's credibility. For example:

....

The individual may not take prescription medication because the side effects are less tolerable than the symptoms.

The individual may be unable to afford treatment and may not have access to free or low-cost medical services.

The individual may have been advised by a medical source that there is no further, effective treatment that can be prescribed and undertaken that would benefit the individual.

SSR 96-7p (emphasis added).

⁵While Social Security Rulings are not binding on this court, they must be applied by the ALJ. *See Myers v. Apfel*, 238 F.3d 617, 620 (5th Cir. 2001); 20 C.F.R. § 402.35(b)(1).

Ample record evidence explains Pope's limited reliance upon pain medication and medical treatment after 1999. Pope took at least a dozen pain medications and made frequent visits to several different doctors over the course of several years until her medical benefits were exhausted and the treatments recommended by her doctors were repeatedly denied by her insurance company. After her injury to her right foot and ankle on September 19, 1995, Pope was prescribed or used the following medications and devices: Tylenol with Codeine; Ibuprofen; Norflex; a bone stimulator; Orudis; anti-inflammatory medication; a UNNA boot; ace bandages; a soft cast; a hard cast; Lortab; Daypro; injections of Lidocaine into the cutaneous nerve in her foot; Darvocet; physical therapy; Zantac; Flexeril; Neurontin; orthopedic shoes; Pamelor; Biofreeze cream; Motrin; crutches; Naprosyn; Citotec; Advil; and Arthrotec. (Tr. 200-320). The record shows that Pope took pain medications on a continuous basis until at least 1999, when Dr. Ghadially opined that "[p]ain pills are of limited help to her as of this point in time." (Tr. 253). Pope also testified she stopped taking over-the-counter pain medication due to the side-effects. (Tr. 46).

As far as seeking medical treatment, Pope made nearly forty visits to Drs. Argilagos, Densen, Ghadially, and Mechanik from late 1995 to early 2000 (Tr. 200-320), and Pope testified she continued seeking medical evaluations until her health insurance ran out (Tr. 65-67). Drs. Ghadially and Mechanik concluded that Pope needed further surgery for her right foot, but surgery was repeatedly rejected by the insurance company. (Tr. 250, 257-58, 259-60, 261). The record also shows that Pope's prescriptions for pain medication and orthopedic shoes were repeatedly denied as well. (Tr. 209-10, 269).

SSR 96-7p required the ALJ to consider this information before inferring that Pope's allegations of pain lacked credibility due to her current lack of pain medication or medical treatment. The ALJ's decision contains no such analysis, and thus, violates the requirements of SSR 96-7p.

The ALJ also premised his finding that Pope has a residual functional capacity for light work on the facts that she drove herself to college classes twice a week; helped with her grandchildren; sat in the hearing room for over forty-five minutes without any noticeable problem; and that she was able to converse easily. (Tr. 17). These are not substantial evidence for the ALJ's conclusion that Pope has the capacity to perform light work and to stand or walk for a total of three hours in an eight hour work day.

Residual functional capacity is an assessment of an individual's ability to perform sustained work-related physical activities in a work setting for eight hours a day, five days a week, or the equivalent work schedule. *See* SSR 96-8p. Sporadic activities such as driving to class twice a week, helping with grandchildren, and sitting for forty-five minutes do not provide an adequate basis to conclude that Pope has the ability to perform work at this level. "The ability to perform sporadic light activities does not mean that the claimant is able to perform full time competitive work." *Myers v. Apfel*, 238 F.3d 617, 620 n.2 (5th Cir. 2001) (quoting *Ross v. Apfel*, 218 F.3d 844, 849 (8th Cir. 2000)). As far as helping with her grandchildren, Pope testified that "I try to help whatever I can with [the grandchildren] as far as, you know, getting them together for homework and things like that." (Tr. 40). The record does not indicate what level of activity this actually represents; nor does it provide a clear basis for determining a residual functional capacity for work at the light exertional level. And with respect to sitting in the hearing for forty-five minutes, the court in *Lovelace v. Bowen*, 813 F.2d 55, 60 (5th Cir. 1987), noted, "[e]ven if a person's demeanor can be taken to reflect

his degree of pain when that pain is chronic, the issue is not how much pain [the claimant] suffers when he is at rest. The relevant question is how much pain he experiences when trying to work. [The claimant's] demeanor at the hearing sheds little, if any, light on that question."

In determining Pope's residual functional capacity, the ALJ also rejected Dr. Ghadially's opinion that the claimant was unable to perform work in any capacity, stating that "Dr. Ghadially failed to document the file with objective medical evidence or diagnostic testing to support his opinion." (Tr. 18). The ALJ correctly noted that such a conclusion by a doctor is not entitled to controlling weight. *See Frank v. Barnhart*, 326 F.3d 618, 620 (5th Cir. 2003). However, in this case, the ALJ failed to consider all of the evidence from the treating doctors in determining Pope's residual functional capacity, and also failed to present good cause as to why such evidence should be rejected. *See Myers v. Apfel*, 238 F.3d 617, 621 (5th Cir. 2001).

The medical records show at least five doctors examined Pope's right foot and ankle, with each diagnosing a problem.⁶ Pope made nearly forty visits to Drs. Ghadially, Mechanik, Argilagos, and Densen from late 1995 to early 2000. (Tr. 200-320). Notes taken during the physical examinations conducted by these doctors reflect a consensus that Pope has non-union of the fifth metatarsal head in her foot, tarsal tunnel syndrome, and nerve entrapment.⁷ (Tr. 70-71, 266-67, 274-

⁶Dr. Ghadially diagnosed Pope as suffering from non-union of the fifth metatarsal bone in her right foot, tarsal tunnel syndrome, and nerve entrapment, and it was his opinion that she would require additional surgery on her right foot. (Tr. 266-67, 279, 283-84). Dr. Mechanik made the same diagnoses, and also repeatedly submitted Pope for surgery. (Tr. 274-75, 278). Dr. J.S. Lee noted moderate to severe osteoarthritic change of the metatarsal joints in both feet, and calcification at the base of the fifth metatarsal bone on her right foot. (Tr. 348-49). Dr. Kahkeshani conducted an EMG on Pope, which indicated there was nerve entrapment. (Tr. 277). Dr. Argilagos indicated that Pope probably needed further surgery on her right foot. (Tr. 209-10). After a disability determination performed on February 2, 2000, Dr. Breazeale concluded that Pope suffered from a fracture of the fifth metatarsal bone and tarsal tunnel syndrome. (Tr. 70-71).

⁷Medically acceptable evidence includes observations made by a physician during physical examination and is not limited to the narrow strictures of laboratory findings or test results. *See Ivy v. Sullivan*, 898 F.2d 1045, 1048-49

75, 276-79, 284, 322). Additionally, these findings were documented with x-rays of Pope's foot and ankle, as well as several MRI's, a CT scan, and an EMG nerve conduction study. (Tr. 244-45, 277, 300, 302, 310-12, 314, 322).

Despite a record that is replete with evidence documenting Pope's right foot and ankle problems, the ALJ does not mention these impairments in his analysis of Pope's residual functional capacity or their effect on Pope's ability to work. While there is some inconsistency in the opinions of the doctors as to how much Pope is limited in her ability to work due to these problems,⁸ all of the examining doctors concluded that Pope could stand or walk around two hours in an eight hour workday, or less. None concluded that she could stand or walk for a total of three hours in an eight hour workday, as did the ALJ. (Tr. 19). Nor did any of the doctors who examined Pope conclude that she could walk or stand a good deal, as is required to perform "light work." *See* 20 C.F.R. § 416.967(b) (stating that a job in the light category requires "a good deal of walking or standing"). The ALJ failed to accord considerable weight to these treating physicians' opinions and diagnoses without showing good cause for doing so. *See Myers*, 238 F.3d at 621. Thus, the ALJ's finding that Pope has the residual functional capacity to perform work at the light exertional level is not supported by substantial evidence.

(5th Cir. 1990).

⁸ For instance, Dr. Ghadially concluded that Pope could not work in any capacity due to the pain in her right foot. (Tr. 263, 265, 267). The other doctor who extensively treated Pope, Dr. Mechanik, concluded that without surgery to repair her right foot, Pope "will not even come close to returning to a normal lifestyle." (Tr. 269). After a functional capacity evaluation, Dr. Brenan concluded that Pope "cannot return to work at this time." (Tr. 376). By comparison, after an evaluation conducted at the request of the ALJ, Dr. Barnes concluded that Pope could work at least at the sedentary level. (Tr. 323). He also stated that Pope could stand at least two hours in an eight hour work day. After conducting a disability determination, Dr. Breazeale opined that Pope could stand and/or walk at least two hours in an eight hour workday, and could sit for about six hours in an eight hour workday. (Tr. 235).

B. The Case Aide “Past Relevant Work” Finding


Pope’s other argument is that the ALJ incorrectly found her not disabled because she could perform her past relevant work as a case aide/community worker. Pope contends that her position with AmeriCorps VISTA was volunteer work, and therefore exempt under 20 C.F.R. § 404.1574(d) and SSR 84-24 for purposes of determining substantial gainful activity, and in turn, past relevant work at step four of the evaluation process. The Commissioner concedes this point in her Motion for Remand (Dkt. No. 20). The court agrees with the parties. Section 404.1574(d) and SSR 84-24 specifically exempt volunteer activity performed on behalf of AmeriCorps VISTA as substantial gainful activity under the Act. Substantial gainful activity is an element in the definition of “past relevant work.” *See* 20 C.F.R. §§ 404.1565(a) and 416.965(a) (explaining that “past relevant work” is work that “was done within the last 15 years, lasted long enough for you to learn to do it, and was substantial gainful activity”). Thus, the case aide/community worker position with AmeriCorps VISTA is not past relevant work, and the ALJ applied an incorrect legal standard at step four of the disability analysis.

IV. CONCLUSION

For these reasons, the Commissioner’s decision denying SSI benefits is not based on proper legal standards and is unsupported by substantial evidence. Accordingly, Pope’s Motion for Summary Judgment (Dkt. No. 14) is GRANTED, the Commissioner’s Motion for Remand (Dkt. No. 20) will be GRANTED, and the ALJ’s decision denying benefits is REVERSED, and the case is

REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this opinion.

Signed on September 24, 2004, at Houston, Texas.



Stephen Wm. Smith
United States Magistrate Judge